Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Reply Brief for Appellants

Appeals from the District Court for the Northern District of California, Southern Division

---

BURNHAM ENERSEN
RICHARD MURRAY
LARRY B. DENT
601 California Street
San Francisco, California
Attorneys for Appellants

McCUTCHEN, DOYLE, BROWN & ENERSEN
601 California Street
San Francisco, California
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Nos. 20785 and 21377

In the

United States Court of Appeals

for the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Reply Brief for Appellants

Appeals from the District Court for the Northern District of California, Southern Division

---

INTRODUCTION

The briefs of appellees and of *amicus curiae* largely fail to meet the arguments advanced by appellants in their opening brief. The authorities cited by appellants are substantially ignored; the authorities relied upon and the arguments made by appellees and *amicus* are frequently beside the point; and the principal defense which is made of the Board's actions is premised upon a fundamental distortion of appellants' argument.

The purpose of this reply is to deal, as summarily as possible, with the basic errors in the opposing briefs, and to suggest the ways in which they are most clearly in need of correction.*

ARGUMENT

I. It Is Unquestionably the Board's Duty Under the Statute to Explore the Individual Circumstances of Applicants for Benefits Where Those Circumstances Are Crucial to the Question of Eligibility.

The Act provides, in unmistakable terms, that prior to the payment of unemployment benefits, the Board must make "findings of fact" and "decisions" concerning the right of any claimant to receive such benefits, including findings concerning the applicability of each of the disqualification conditions (Sections 4(a-2), 5(b)). If these provisions are to mean anything, they necessarily mean that the Board *must* make some reasonable effort to determine whether each claimant has "left work voluntarily" without "good cause," or has "failed, without good cause, to accept suitable work"—and that, where the individual circumstances are crucial to eligibility, the Board *must* explore those individual circumstances. As has already been shown (Br. 20-32)† and as is in fact admitted by appellees (R. 91-92), the Board made no effort whatever to examine, upon an individual basis, the eligibility of any single one of the thousands of C(6) firemen applying for benefits.

The only relevant response which could be made by appellees concerning their failure to consider the individual circumstances of the C(6) firemen would be that those circumstances were

---

*No response has been made to Part III of the argument in appellants' opening brief and nothing further will be said here about those matters. Parts II and III of the present argument touch upon the matters dealt with, respectively in Parts I and II of appellants opening argument. Part I of the present argument responds to appellees' apparent misconception of the duties of the Board under the statute.

†References in this brief are thus: to appellants' opening brief: (Br. 10); to appellees' brief: (Appellees' Br. 20); to the brief of *amicus curiae*: (Am. Br. 15); and to the record: (R. 157).

wholly immaterial to the matter of eligibility for benefits. Appellees do attempt such an argument, but, as has already been seen (Br. 20-32), and as will be further illustrated below (Part II, *infra*) it must fail for two reasons: appellees' interpretation of the statute, upon which their argument is necessarily premised, is manifestly unreasonable; and, even if that interpretation were accepted, it would fail to dispose of the eligibility of many C(6) firemen as to which the individual circumstances would still remain controlling.

Appellees do not rest, however, with efforts to justify the propriety and relevance of the Carter memorandum. They also find it necessary to misstate altogether appellants' view of the Board's duties under the statute; to assert that individual findings are not required even when the individual circumstances are dispositive of eligibility; and to argue that, by reason of certain administrative practices of the Board, individual findings concerning the C(6) firemen may actually be deemed to have been made (even though it is elsewhere admitted that they were not).

First: Appellees, perhaps deliberately, seek to distort the nature of appellants' argument. Appellees suggest that under appellants' interpretation of the statute, the Board must issue individual findings for each claim even when all relevant facts are wholly common to a group of claimants and the individual circumstances could therefore make no conceivable difference (Appellees' Br. 32-34, 16-17). Having erected this straw man, appellees then proceed to attack it. They argue that it would be "physically impossible" to make individual findings with respect to the many thousands of men claiming unemployment benefits each year (Appellees' Br. 32) and that, therefore, "common sense alone refutes appellants' argument" (Appellees' Br. 16). As *amicus curiae* had no difficulty in perceiving, however (Am. Br. 18-19), appellants advance no such argument. Indeed, and as is perfectly clear from their opening brief (Br. 20-21) appellants say no more, and the statute can conceivably require no less, than that the Board explore the individual circumstances where, as here, they are dispositive of the question of eligibility.

Second: Appellees next appear to argue that the Board need not examine the individual circumstances even when the eligibility of the claimant may turn upon those circumstances. Thus they say that blanket rulings were made by the Board in both *Kennedy* and in *Brotherhood of Ry. & S.S. Clerks v. R.R. Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956), and that "no question was raised in those cases concerning the absence of individual findings by the Board"; and they imply, on the basis of these cases, that no individual findings need be made in any situation in which substantial numbers of claimants might be involved (Appellees' Br. 8, 17, 34, 35). Appellees fail to note, however, that the sole substantive issue in both the *Kennedy* and *Brotherhood* decisions was whether the claimants there involved were disqualified by the provisions of Section 4(a-2)(iii) of the Act, which forbid the payment of benefits to men who are unemployed because of an unlawful strike, an issue which could be and was determined without any need for consideration of the circumstances of the individual strikers. Moreover, both the District Court and the Court of Appeals in *Kennedy* obviously assumed that, with respect to any additional matters which might have affected individual eligibility, the Board had complied with its statutory duty. See the discussion in appellants' opening brief (Br. 55 footnote), and, in particular, see the affidavit of H. L. Carter in the *Kennedy* case, to which appellees themselves refer.*

---

* "Upon reviewing the information thus secured [from an investigation of the circumstances of the strike], I advised the regional office by teletype on October 9, 1950, that Section 4(a-2)(iii) was not applicable. *The regional office then proceeded with the adjudication of the claims.*" (Emphasis added.) (Appellees' Br. 35)

Appellees also assert that their supposed "administrative practice" of making blanket rulings with respect to large groups of applicants has been legislatively affirmed because Congress has not seen fit to put a stop to it (Appellees' Br. 17). But appellees point to no single instance in which this supposed "practice" has been considered by Congress, and they refer to no previous situation where, as here, the Board, by means of a general ruling, has sought to avoid its obligations under the statute to make individual findings as to matters upon which the individual facts are indispensable.

Third: Appellees' final argument is the most curious of the lot: Even assuming that the statute requires individual findings as to all relevant matters, and even admitting that in the case of the C(6) firemen, those matters were not even considered, appellees argue that the Board has nevertheless complied with the command of the statute. Such compliance, it is said, consisted of the Board's acceptance of "the claimant's registration as initial proof of unemployment, sufficient to certify payment," which actions "certainly constitute findings" (Appellees' Br. 33-34). Such bootstrap logic is indeed difficult to take seriously. Surely appellees do not contend that they are entitled to honor any claim, no matter how unfounded, simply because it has been filed. The provisions of the statute are directly to the contrary. Neither can appellees plausibly argue that the "acceptance" of such a claim can possibly constitute "findings" by anyone as to the matters which, pursuant to the directions of the Carter memorandum, were expressly made immaterial: whether, on the basis of the individual circumstances, the C(6) firemen left work with "good cause"; whether the comparable jobs constituted "suitable work"; and, if so, whether those jobs were rejected "without good cause."

II. The Payment of the Unemployment Benefits to the C(6) Firemen Was Contrary to the Statute and in Excess of the Jurisdiction of the Board.

A. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE C(6) FIREMEN HAD "LEFT WORK VOLUNTARILY" WITHOUT "GOOD CAUSE" (SECTION 4(a-2)(i)).

Insofar as the language of the statute is concerned, appellees' principal defense of the Board's conduct continues to be based upon their construction of the word "work"—that it refers, not to a man's work with the railroad, but to the particular duties upon which he may, from time to time, be engaged (Appellees' Br. 27).* As appellants have shown at some length, such a

*Appellees also apparently contend that the severance allowance, rather than performing the same economic function as unemployment benefits,

construction would contravene the manifest purpose of the Act, its carefully balanced disqualification conditions and the understanding of Congress concerning its meaning at the time it was enacted (Br. 23-26). Appellants' arguments are not met, and the statutory and legislative materials adduced in support of them are ignored.

Moreover, appellees now appear to concede, as appellants have argued (Br. 27-28), that even if their interpretation of the statute were correct, it would still not dispose of need for individual findings in the cases of many of the C(6) firemen. Thus appellees admit (Appellees' Br. 25) that those firemen who quit their jobs before those jobs were eliminated would not be covered by the terms of the Carter memorandum (See Br. 28). Yet it is alleged in the verified complaint (R. 16-17), and it is undisputed by appellees, that such firemen were in fact paid unemployment benefits pursuant to the Carter memorandum. Since the Carter memorandum admittedly did not apply, the payment of these benefits, without prior findings concerning eligibility, was in clear violation of the terms of the statute.

Appellees also apparently agree that if a man were offered another fireman's position as a "comparable job," he would, under the Board's own regulations, have "left work voluntarily" (Appellees' Br. 26-27; see also Br. 27-28). Appellees argue that

---

was instead some sort of "bonus" having a different purpose altogether. Appellees refer, in this connection, to a colloquy between appellee Habermeyer and Senators Lausche and Magnuson which took place on August 30, 1965, some 22 months after the issuance of the Award and some 14 months after the promulgation of the Carter memorandum (Appellees' Br. 22-24). The exchange casts little light upon the supposed "real purpose" of the severance allowance. It does disclose, however, that though Senator Magnuson may have been pleased with appellees' actions concerning the C(6) firemen, Senator Lausche was apparently astounded by them. In any event, neither the self-serving statements of appellee Habermeyer nor the offhand opinions of Senators Lausche and Magnuson are pertinent here. Surely appellees do not suggest that these matters can conceivably constitute "legislative history" worthy of consideration by this Court. Moreover, it is unclear how appellees' argument, even if it were supported in the record, would cast light upon the meaning of the words "left work voluntarily" as used in the statute; and that, after all, is the matter which is presently in issue.

this situation has "no relationship" to the Award—which, they imply, did not contemplate the offer of a fireman's job—but they necessarily ignore the provisions of the Award which define the comparable jobs as those "such as, but not limited to engineer, fireman (helper), brakeman or clerk" (Br., App. A, p. 1). Appellees argue that the record does not disclose whether such fireman jobs were in fact offered to any C(6) firemen; but the argument puts the shoe upon the wrong foot. Where, as here, a particular comparable job contemplated by the Award might clearly have disqualified the applicant for benefits, it was the Board's duty to determine whether such a job was in fact offered—and whether none, some, or many of the C(6) firemen might thereby have been disqualified. In making the payments without looking at the facts—in assuming away the problem—the Board plainly failed to perform its duty under the statute.

B. THE BOARD FAILED TO DETERMINE, AS THE STATUTE REQUIRED, WHICH OF THE C(6) FIREMEN WHO REJECTED THE OFFERS OF "COMPARABLE JOBS" THEREBY "FAILED WITHOUT GOOD CAUSE TO ACCEPT SUITABLE WORK" (SECTION 4(a-2)(ii)).

Appellees apparently agree that the comparable jobs offered to the C(6) firemen might well have constituted "suitable work" within the meaning of the statute (Appellees' Br. 24-25). Their whole position under Section 4(a-2)(ii) is therefore premised upon the assumption that each of the firemen, in rejecting the comparable jobs, acted with "good cause."

Appellees' original argument in support of their assumption of good cause—that the Award gave each of the firemen "a free choice" to stay or to leave—has already been considered (Br. 32). The argument is plainly irrelevant either to the language or to the purpose of the statute and is therefore entitled to no weight.

Appellees now advance a new and startlingly different argument as to why the suitable work offered to the C(6) firemen was supposedly rejected with "just [sic] cause" (Appellees' Br. 25). It is this:

> "[W]here, as here, if a fireman's job were abolished and he was offered another job his refusal of the offered job in the first instance would be with *just cause.* The just cause was the determination of the Board that the refusal of a comparable job and the acceptance of the severance pay should not penalize him insofar as the insurance benefits were concerned." (Emphasis in original.)

If this statement has any meaning, it must be that the Board itself, by way of the Carter memorandum, *created* the "good cause" (*i.e.,* reliance upon the memorandum) on the basis of which the suitable work offered to the C(6) firemen might freely be rejected. But how can this be? Can the Board, in making a prospective ruling such as the Carter memorandum, proceed upon the assumption that the effect of the ruling has already been felt? It is apparent that the argument defeats itself; for if it were admitted, there could be no evasion of the disqualification conditions of the Act which the Board could not make lawful simply by sanctioning it in advance.

III. The District Court Had Power to Review, at the Instance of Appellants, the Unlawful Actions of the Board.

A. APPELLANTS CLEARLY HAVE STANDING TO CHALLENGE APPELLEES' UNLAWFUL WASTE OF THE FUNDS IN THE ACCOUNT.

Appellees' argument upon the standing issue proceeds throughout upon the assumption that appellants are no different from general Federal taxpayers who contribute to the general Federal revenues, and as such, have no standing to challenge expenditures of the general Federal Treasury. Yet as we have shown at some considerable length (Br. 36-41) that assumption is wholly without foundation. Appellants' argument upon this point has not been met, and, indeed, the controlling authorities have been almost wholly ignored. Thus *Stark v. Wickard,* 321 U.S. 288 (1944), *Coleman v. Miller,* 307 U.S. 433 (1939), *United States v. Butler,* 297 U.S. 1 (1935), *Reynolds v. Wade,* 249 F.2d 73 (9th Cir. 1957) and *Smith v. Virgin Islands,* 329 F.2d 131 (3d Cir. 1964) have all been relegated to a footnote and distinguished upon the supposed ground that only one of them (*Butler*) "involved a

federal tax" (Appellees' Br. 14). Appellees' supposed distinction is both inaccurate and misleading. It is inaccurate because *Stark, Reynolds* and *Smith* each quite plainly involved the expenditure of taxes levied under Federal law.* It is misleading because the whole point of each of these cases is that the principle of *Massachusetts v. Mellon* cannot and will not be applied where, as here, the plaintiffs are something *other* than general Federal taxpayers challenging expenditures from the general Federal Treasury.

The additional arguments advanced by appellees and by *amicus* are equally beside the point. Thus appellees cite no less than nine cases in support of the proposition that standing to sue does not exist unless the plaintiff can show a "legally protected interest which has been invaded by the Government" (Appellees' Br. 11-12); but appellees do not explain how this tautology in any way advances their position. Certainly the cases upon which they rely do not even address, much less resolve, the standing issues presented here.

Both appellees and *amicus* continue to insist, solely on the basis of *Kennedy,* that appellants are without standing to sue because they cannot demonstrate precisely *when* (not whether) they will feel the bite of the Board's unlawful disbursements (Appellees' Br. 10, 13-14; Am. Br. 13-14). Yet they fail altogether to explain why, if this were so, any taxpayer would ever have standing to challenge illegal expenditures or why such standing has repeatedly been upheld by the Supreme Court and by this Court in cases such as *Stark v. Wickard, Coleman v. Miller,* and *Reynolds v. Wade* (see Br. 40-41).

---

*It is perfectly apparent that the *Reynolds* and *Smith* cases both involved the legality of the expenditure of revenues derived from taxes. It is equally apparent that if, as appellees assert, appellants' contributions to the Account constituted taxes, the same was true of the contributions of the milk producers in *Stark v. Wickard.* (See 321 U.S. at 303 where the contributions were described as "a sales tax.") Neither is there any doubt that the levies paid in each of these cases were grounded upon Federal law: in *Stark v. Wickard,* upon the Agricultural Marketing Agreement Act of 1937, and in *Reynolds* and *Smith* upon the Federal statutes creating the power of the territorial legislatures to tax and upon the enactments made pursuant to the Congressional authority.

B. THE DOCTRINE OF ADMINISTRATIVE DISCRETION DOES NOT IMMUNIZE THE BOARD'S ACTIONS FROM JUDICIAL REVIEW.

Appellees assert that this Court cannot review their interpretations of the provisions of the statute unless those interpretations were "arbitrary and capricious and without any rational basis" (Appellees' Br. 27-28).* Yet appellees make no serious effort to deal with appellants' authorities (Br. 45-49) which demonstrate that no such elaborate self-restraint need or should be indulged. Indeed, only one of appellants' cases—*Leedom v. Kyne,* 358 U.S. 184 (1958)—is even mentioned by appellees, and that in an unpersuasive footnote (Appellees' Br. 28). Nor do the cases upon which appellees themselves rely materially advance their position. Thus in *Udall v. Tallman,* 380 U.S. 1 (1965) (Appellees' Br. 29), the administrative construction was accepted only because it was "quite clearly . . . reasonable" (380 U.S. at 4), and in *Panama Canal Co. v. Grace Line,* 356 U.S. 309 (1957) (Appellees' Br. 28-29), as the quoted passage literally says, the agency's determinations related to "matters of doubtful or highly debatable inference from large or loose statutory terms." Yet where, as here, the statutory command is precise, the words used are ordinary and non-technical, and the agency has obviously not been "left at large," the agency must follow the statute or its order will be set aside. *Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 616-17 (1944) (Br. 46-47).

C. JUDICIAL REVIEW OF THE PRESENT ACTIONS OF THE BOARD HAS NOT BEEN PROHIBITED BY CONGRESS.

Appellees and *amicus* do not dispute the proposition (Br. 50-51) that, unless prohibited by Congress, the courts of the United States have jurisdiction to review all arbitrary agency action. Neither do they deny that if, as seems clear here, the agency has exceeded its statutory authority, all inferences should be indulged in favor of a right of review (Br. 53-56). Their whole argument is therefore premised upon the assumption that the Act expressly

---

*These words, in the view of appellants, fairly describe the actions of appellees; but the point is of no moment, for the law is not as appellees state it.

prohibits judicial review of the Board actions now in dispute (Appellees' Br. 4-9; Am. Br. 3-7).

The relevant provisions are admittedly found in subsections 5(c), 5(f) and 5(g) of the Act. Appellees and *amicus* cannot and do not contend that judicial review of the actions of the Board granting the claims of the C(6) firemen is prohibited by subsections 5(c) or 5(f); for it is admitted that these subsections deal only with the situations (neither applicable here) where either the claim or the employment relationship has been denied (Appellees' Br. 4-6; Am. Br. 3-4).* Appellees and *amicus* therefore necessarily base their argument on subsection 5(g).

As appellants have previously observed (Br. 53), this subsection also, by its own terms, applies only to matters determined under subsection 5(c), and therefore has nothing to do with the decisions presently in issue. Both appellees and *amicus* deny that this is so, but they have chosen to omit from their quotations of subsection 5(g), as well as from their argument upon the point, the very language which defeats their contention (Appellees' Br. 6; Am. Br. 4). Subsection 5(g) provides, in relevant part (with the critical language underlined):

> "Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* and [determinations concerning availability of funds] shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes . . . and shall not be subject to review in any manner other than that set forth in subsection (f) of this section."

If, as appellees contend, *all* findings and conclusions of the Board having to do with claims were to be made conclusive, there would

---

*Appellees do assert, citing cases, that where Congress has provided a *particular method* of judicial review, that method must be followed (Appellees' Br. 9); but neither the assertion nor the authorities are relevant where, as here, the judicial review provided in the statute relates to matters *other* than those which are in dispute. See Stark v. Wickard, 321 U.S. 288, 309 (1944) and the other cases cited and discussed in appellants' opening brief (Br. 50-55).

have been no occasion to use the word "other" in the immediately succeeding phrase which expressly limits finality to determinations made pursuant to subsection (c). To give any effect, therefore, to the word "other," the statute must be read to say that finality is accorded *only* to proceedings taken, and findings and conclusions made, pursuant to subsection (c).* Not only is this construction the only permissible one under the language which is directly applicable, it is also that which is most consistent with the remainder of the subsection; for the matters in question are made final only "except as provided in subsection (f)" and subject to review in no manner "other than that set forth in subsection (f)." Since subsection (f) admittedly relates *only* to matters determinable under subsection (c), it is impossible to read the two portions of subsection (g) in *pari materia* without concluding that the matters made final are those described in subsection (c) and reviewable under subsection (f).

Thus, in order to prevail, appellees and *amicus* must go beyond the language of the statute and persuade this Court that it prohibits that which it does not. They therefore resort to legislative history (Appellees' Br. 8-9; Am. Br. 5-6).

It is, of course, axiomatic that legislative history can properly be used in the interpretation of a statute only when it is clear and unambiguous and illuminates directly the question which is at issue.† The question here is this: Whether Congress, in providing

---

*Any other construction would violate the fundamental rule that all provisions of a statute must be given effect and that none may be ignored. See Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963):

> "The construction . . . adopted by the District Court would appear to render the words 'at law' functionless, and 'a legislature is presumed to have used no superfluous words.' "

†See, *e.g.*, United States v. PUC, 345 U.S. 295, 319 (1953) (Jackson, J. concurring); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947). Moreover, special caution must be used where, as here, the matters relied upon are no more than random statements, plucked from thousands of pages of hearings, which were made by witnesses rather than by Congressmen, which were not reflected in the Committee reports, and which, by hypothesis, were not carried forward into legislation. See Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-96 (1950) (Jackson, J. concurring).

a particular procedure for administrative and judicial review of certain actions of the Board, intended to eliminate altogether the inherent right of judicial review which would otherwise exist as to all other Board actions. Nothing in the legislative materials relied upon by appellees and *amicus* even approaches this question.

Appellees first point out that, as one railroad representative remarked during the 1938 hearings prior to the passage of the Act, there was "no appeal provided" in the bill for the railroads—but this observation obviously casts no light upon whether Congress intended that all judicial review *other* than that expressly provided in the statutory scheme was to be *prohibited* by the statute. See *Stark v. Wickard,* 321 U.S. 288, 307-10 (1944).

Again, Mr. Schoene, then as now counsel for *amicus,* stated at one point during some hearings in 1945 that the railroads would have "no appealable interest" in the award of an annuity unless the employment relationship were in dispute; but neither the passage quoted (Am. Br. 5-6) nor any other portion of those hearings indicates that any member of the Committee (much less Congress as a whole) adopted or approved this self-serving observation. Moreover, the statute to which Mr. Schoene's remarks were addressed was not even the statute which is before this Court —it was, rather, old Section 11 of the Railroad Retirement Act, which the bill then before the Committee was intended to replace.*

Amicus' reference to statements by a railroad spokesman at the same hearings (Am. Br. 6) is blatantly misleading—for it is only necessary to read the statements in context to conclude that they had nothing whatever to do with an employer's right of review of decisions granting benefits under the Railroad Unemployment Insurance Act.†

---

*See page 327 of the 1945 hearings. Even taken in context, Mr. Schoene's remarks would appear to have been somewhat misleading, for old Section 11 did not even purport to distinguish, as regards appeals by employers, between those which involved the employment relationship and those which did not. Neither did the cases. See Utah Copper Co. v. R.R. Retirement Bd., 129 F.2d 358 (10th Cir. 1942).

†The matter which was said to have been "unreviewable" (Am. Br. 6; Hearings, pp. 558-59) was the establishment by the Board "with the

Thus, as is so often the case, "the legislative history is more conflicting than the text is ambiguous," *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49 (1950), and we are brought round, once again, to the statute. Since the statute does not even deal with the question of review of the matters now before this Court, the normal presumption in favor of the rule of law impels the conclusion that a right of judicial review necessarily exists. *Stark v. Wickard,* 321 U.S. 288, 309-10 (1944).

D. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT INSULATE THE BOARD'S ACTIONS FROM JUDICIAL REVIEW.

Appellees cite numerous cases for the proposition that an action which would interfere with "public administration" is a suit against the sovereign (Appellees' Br. 15), but they concede, as they must, that this rule has no application where Federal officers have "exceeded their statutory authority" (Appellees' Br. 16). At one point in their brief, appellees curiously assert that "in the instant case there is no question raised as to the authority of the Board to make the challenged payments" (Appellees' Br. 28 footnote), but it is precisely that question which appellants raise: Whether the Board, under the terms of the statute, had power to make the payments without exploration of the individual circumstances which were crucial to eligibilty (Br. 20-32; pp. 1-8, *supra*).

If, as appellants argue, the Board's interpretation of the disqualification provisions of the Act was wrong, it is obvious that an investigation of the individual circumstances was essential to the disposition of *all* of the claims of the C(6) firemen—and that the Board's failure to make individual findings prior to the payment of benefits was in violation of the statute in every single instance. There is therefore no way in which the sovereign im-

---

cooperation of the employers and employees" of certain industry-wide *standards* of permanent disqualification for purposes of annuities under the Railroad Retirement Act (Section 2(a) 4), a subject which has little apparent relevance to the reviewability of *awards* under the Railroad Unemployment Insurance Act. The matter as to which "the employer is left no voice" (Am. Br. 6; Hearings, p. 556) was the *alternative* afforded to an employee, for purposes of the former Act, of basing the determination of his "regular occupation" upon either the preceding five-year or fifteen-year period of service (Section 2(a) 4).

munity argument can preclude this Court from reviewing appellees' erroneous interpretation of the Act. Moreover, and even if appellees were correct in their construction of the statute, there were clearly many C(6) firemen as to whose eligibility an examination of the individual circumstances would still have remained indispensable (Br. 27-28; pp. 6-7, *supra;* and in paying benefits to these firemen without first exploring those circumstances, the Board indisputably exceeded its power under the statute.

E. THE C(6) FIREMEN ARE PLAINLY NOT INDISPENSABLE PARTIES TO THIS ACTION.

Appellees' defense of their indispensable party position is clearly only perfunctory. Thus they fail even to mention *Reich v. Webb,* 336 F.2d 153 (9th Cir. 1964) (Br. 59) which alone refutes their contentions, and the cases which they do cite (Appellees' Br. 18-19) are either irrelevant or support appellants' position.*

Appellees suggest that the interests of the C(6) firemen are somehow inadequately represented by the Board and by the Department of Justice (Appellees' Br. 18-19), but they fail to note that those interests are also vigorously advanced by *amicus curiae,* an association consisting of the chief executive officers of numerous railway labor organizations. Compare *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 407-08 (1964).

Appellees also rely upon the District Court's "finding" that the relief sought herein "would adversely affect" the interests of

---

*Thus Denver & Rio Grande R.R. Co. v. United States, 124 Fed. 156 (8th Cir. 1903) did not even involve an indispensable party issue. Metropolis Theater Co. v. Barkhausen, 170 F.2d 481 (7th Cir. 1948) involved two concurrent lessees of adjoining property upon which a single building stood and whose interest were, therefore, completely intertwined. Litchfield v. Register and Receiver, 76 U.S. (9 Wall.) 575 (1869) was distinguished away in Work v. Louisiana, 269 U.S. 250, 255-56 (1925) which held that homestead entrymen were *not* indispensable parties to an action to enjoin the implementation of an allegedly illegal order of the Secretary of the Interior, and which, if plaintiff prevailed, would destroy their claims. Montford v. Korte, 100 F.2d 615 (7th Cir. 1939) held that an absent pledgee of stock certificates was *not* indispensable to an action which invalidated the transfer of the certificates from the former owner to the pledgor.

the C(6) firemen (Appellees' Br. 19). Even if it were supported in the record, such a finding obviously would not lead to a conclusion that the C(6) firemen were indispensable parties. *Reich v. Webb, supra;* Br. 57. Moreover, and despite the provisions of Rule 18(3),* appellees point to no evidence in the record to support this finding, and indeed there is none.

The cases cited by *amicus* are no more helpful to them than those relied upon by appellees.† Moreover, the argument which they are called upon to support is only that where absent parties are, *in fact,* indispensable, the court cannot proceed even if they cannot be joined (Am. Br. 9). The argument, however, obviously begs the question, for it ignores the settled rule that in *determining* the issue of indispensability—a decision traditionally based upon practical and equitable considerations—one of the principal factors to be considered is whether the absent parties are beyond the jurisdiction of the court and whether a conclusion of indispensability would therefore deprive the plaintiff of any remedy whatever. See *Bourdieu v. Pacific Western Oil Co.,* 299 U.S. 65, 70-71 (1936).

---

*This finding was specified as error by appellants (Specification 6) and the ground of error argued was the lack of evidence to support it (Br. 14). Despite the provisions of Rule 18(3), appellees have provided no record references relied upon to support this finding. See also the finding challenged in Specification 4, upon which appellees apparently also rely (Appellees' Br. 20), and which they have also failed to support in the record.

†State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936) held only that the State of Washington, which claimed ownership of certain lands also claimed by the United States, was an indispensable party to an action to determine title to those lands. Provident Tradesmen's Bank & Trust Co. v. Lumberman's Mutual Casualty Co., 365 F.2d 802 (3d Cir. 1966) held that the insured owner of an automobile was indispensable to an action establishing that the accident driver had been within the scope of permission granted to him by the insured. Though this proposition may not be obvious, it is surely immaterial here. In Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964), the Court, in holding the absent party *not* indispensable, fromulated the rule as to indispensability in a manner which would quite clearly lead to the same conclusion with respect to the C(6) firemen (334 F.2d at 777).

CONCLUSION

For the reasons stated herein and in appellants' opening brief, the orders and judgment below should be reversed, and appellants should be awarded the relief prayed for in their complaint.

Dated: San Francisco, California, February 20, 1967.

Respectfully submitted,

BURNHAM ENERSEN
RICHARD MURRAY
LARRY B. DENT
Attorneys for Appellants

McCUTCHEN, DOYLE, BROWN & ENERSEN
Of Counsel

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD MURRAY